GILBERT W. DAILY

IBLA 81-803 Decided July 9, 1982

Appeal from decision of Arizona State Director, Bureau of Land Management, denying the protest of the designation of inventory unit AZ 2-129 as a wilderness study area. 8500 (931).

Affirmed.

1. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act -- Words and Phrases

   "Roadless." H.R. Rep. No. 94-1163, 94th Cong., 2d Sess. 17 (1976), provides a definition of "roadless" adopted by the Bureau of Land Management in its Wilderness Inventory Handbook. The word "roadless" refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.

2. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

   Where the record evidences BLM's firsthand knowledge of the lands within an inventory unit and contains comments from the public as to the area's fitness for wilderness preservation, BLM's subjective judgments of the area's naturalness qualities are entitled to considerable deference.

3. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

   In evaluating a unit's opportunities for solitude, BLM is directed by the Wilderness Inventory Handbook to consider factors which influence solitude only as

they affect a person's opportunity to avoid the sights, sounds, and evidence of other people in the inventory unit. Factors or elements influencing solitude may include size, natural screening, and the ability of the user to find seclusion.

4. Federal Land Policy and Management Act of 1976: Wilderness -- Mining Claims: Generally

The BLM is directed by sec. 603(c) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782(c) (1976), to manage lands under review for wilderness suitability so as to prevent impairment of wilderness characteristics, except that the continuation of existing mining uses in the same manner and degree in which they were being conducted on the date of enactment of FLPMA (Oct. 21, 1976) is allowed. Such grandfathered use is properly regulated to prevent unnecessary or undue degradation of the land and its resources.

APPEARANCES: W. T. Elsing, Esq., Phoenix, Arizona, for appellants; Dale D. Goble, Esq., Office of the Solicitor, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Gilbert W. Daily appeals from a decision of the Arizona State Director, Bureau of Land Management (BLM), dated March 12, 1981, denying the protest of the designation of inventory unit AZ 2-129 as a wilderness study area (WSA). 1/ This unit, East Clanton Hills, is located along the Yuma-Maricopa County line and includes 36,600 acres of BLM administered land.

BLM's designation of wilderness study areas was taken pursuant to section 603(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1782 (1976). That section directs the Secretary to review those roadless areas of 5,000 acres or more and roadless islands of the public lands which were identified during the inventory required by section 201(a) of the

1/ Although counsel filed a notice of appeal on behalf of Gilbert Dailey and Harold Kramer, no protest was filed by Harold Kramer. Kramer's failure to protest the designation of the WSA precludes our entertaining an appeal from him. See C & K Petroleum Co., 59 IBLA 301, 302 n.1 (1981). We note that the acreage for this unit was amended and the changes published in the Federal Register on Mar. 31, 1981 (46 FR 19605). This notice provided that persons wishing to protest the decision should file such protest by Apr. 30, 1981. Kramer did not protest and therefore is precluded from appealing the decision.

Act as having wilderness characteristics described in the Wilderness Act of September 3, 1964, 16 U.S.C. § 1131(c) (1976). Following review of an area or island, the Secretary shall from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness.

The wilderness characteristics alluded to in section 603(a) are defined in section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1976):

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

The review process undertaken by the State Offices pursuant to section 603(a) has been divided into three phases by BLM: Inventory, study, and reporting.

In his protest to the designation of unit 2-129 as a WSA, appellant, who is colessee of several mining claims located prior to 1976, specified that roads, used in conjunction with the mines and identified on a map, had been improved in 1964 and subsequently maintained by mechanical means. Appellant explained that D-2 and D-6 Caterpillars are kept on the property and have been used, several times a year, to improve and maintain the "roads" to insure relatively regular and continuous use. Appellant submitted a map accompanying an affidavit which showed the "roads" that can easily be traversed by passenger car. Appellant alleged that there are approximately 16 miles of graded, maintained, and regularly used roads on the claims. He said that from September 1, 1978, to May 30, 1979, 68.6 miles of road were worked and reworked as shown by the recorded affidavit of labor. He alleged that the affidavits for previous years show comparable figures. 2/ Appellant also referred to jeep trails which were graded in places and are regularly and continuously used by vehicles having four or more wheels. Appellant stated that the "roads" are used not only by the owners, lessees and private parties, but also by BLM personnel and the Arizona State Game and Fish Commission.

2/ The affidavits were not included in the case file.

In its response of March 12, 1981, BLM stated that numerous roads within the original inventory unit have been documented through the inventory process and many substantiated by information in appellant's comments and protests. BLM said that these roads were dropped from further wilderness consideration. BLM addressed appellant's contentions regarding the "roads" by stating in its response at pages 1-2:

> In only four instances does our inventory documentation differ significantly from yours. The route crossing the creosote flats in T.1 S., R.11 W., Section 2, and continuing for several miles across the unit to the west does not appear to be "maintained by mechanical means for relatively regular and continuous use" and is considered by BLM to be a vehicle way within the unit. Secondly, the jeep trails you have identified with green lines in T.1 S., R.10 W., Sections 6, 7, 18, are just that, and are considered vehicle ways for our inventory purposes. The remaining green lines located on the map provided by you are apparently mistakenly colored-in topographic lines known as supplementary contours. No jeep trails or ways follow these lines, according to our field checks. Thirdly, the trail from the Yellowbreast Mine to the Hanley Tank is not mechanically maintained and is considered a vehicle way. Lastly, the spur route to the Geoann Claims that extends into Section 14 does not appear to be maintained for relatively regular and continuous use and is a vehicle way.

In his statement of reasons, appellant alleges only that the decision designating unit 2-129 as a WSA is in error, saying only:

> The facts stated in the decision are, for the most part, erroneous. There is a network of roads which were bulldozed. They are in relatively regular continuous use. Many of the roads are now being used by oil companies who are on exploratory projects, dynamiting for seismographic type of work.

[1] The significance of appellant's allegation that certain routes have been improved and maintained by mechanical means is to be found in the Wilderness Inventory Handbook (WIH) issued by BLM on September 27, 1978. 3/ Therein, BLM quoted from H.R. Rep. No. 94-1163 at page 17, which sets forth the definition of a road adopted by BLM: "The word 'roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road." Additional guidance has been provided by BLM in Organic Act Directive (OAD) 78-61, Change 2, in response to the question whether a route is a road if it has been improved to insure relatively regular and continuous use but has not required maintenance as yet. Therein, BLM replies that improvements and relatively regular use would be an indication that the road would be maintained if the need were to arise.

3/ This handbook is Organic Act Directive 78-61.

Although appellant's protest did contain allegations relating to the fact that certain routes had been improved and maintained by mechanical means, his contentions on appeal do not respond to the statements made in BLM's decision. In particular, appellant does not rebut, or even address, BLM's finding that the route crossing the creosote flats, the trail from the Yellowbreast Mine to Hanley Tank and the spur route to the Geoann Claims are not mechanically maintained and are therefore vehicle ways. Nor does appellant show that the jeep trails discussed by BLM are the subject of mechanical maintenance. Appellant does not provide any response to BLM's statement that the remaining green lines on his map are superimposed on topographic contour lines where no ways or roads exist. Appellant only asserts that a network of roads exist. BLM acknowledged this fact in its decision with four exceptions. Appellant does not show any specific error in BLM's decision. BLM's decision will be affirmed when appellant fails to meet its burden of pointing out specific errors of law or fact in the decision below. Sierra Club, 54 IBLA 37 (1981).

In addition to the various jeep trails and ways, appellant alleged the existence of other intrusions which detract from the naturalness of the area. These include various impacts associated with mining such as shafts, dumps, and numerous other manmade excavations and unnatural disturbances.

BLM replied that the man-made workings referred to in the protest are, for the most part, eliminated from the final WSA with three exceptions: BLM stated that the 10'x10'x10' pit on the Geoann Claims was not considered a significant imprint of man, but is rather substantially unnoticeable within the vicinity of hills in which it is situated. BLM found that two exploratory holes on the Big "M" Claims are separated from the accumulation of impacts around the Yellowbreast Mine by several hundred yards, are substantially unnoticeable and observed only upon direct encounter. BLM also found that 23 acres of land around the Yellowbreast Mine in sec. 15 are impacted and removed from the WSA by means of a "cherrystemmed" road which accesses them. In addition, 7,700 acres overlapping the majority of appellant's claims in the northeast portion of the unit are dropped from the WSA because BLM considered them to be either roaded or unnatural. In the narrative of the intensive inventory findings, BLM stated that the remaining 36,600 acres appear to have been primarily affected by the forces of nature with the imprints of man, including several unintrusive mining prospects, substantially unnoticeable.

[2] While the items listed by appellant are undeniable intrusions, we note that in setting forth the definition of wilderness, quoted above, Congress did not require that a wilderness area be free of all imprints of man. Instead, Congress required that an area generally appear to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable. Indeed, in H.R. Rep. No. 95-540, 94th Cong., 2d Sess. 6 (1977), a report prepared to accompany H.R. 3454, 4/ there are listed several examples of intrusions which may be allowed in a designated

4/ This bill was later enacted as the Endangered American Wilderness Act, 16 U.S.C. § 1132 (Supp. II 1978).

wilderness area. Among these are trails, trail signs, bridges, fire towers, firebreaks, fire suppression facilities, pit toilets, fisheries enchancement facilities, fire rings, hitching posts, snow gauges, water quantity and quality measuring devices, and other scientific devices. Based on this guidance, BLM has set forth in its WIH examples of intrusions found on the public lands which, it finds, may be present within a WSA. These additional items include research monitoring markers and devices, wildlife enhancement facilities, radio repeater sites, air quality monitoring devices, fencing, and spring development.

As there is apparently no question that the lands contain imprints of man, appellant's objections to such imprints reduce to a disagreement with BLM as to whether such imprints are substantially noticeable. This question, of course, calls for a highly subjective determination by BLM. In Conoco, Inc., 61 IBLA 23 (1981), we held that BLM's subjective judgment as to an area's naturalness qualities was entitled to considerable deference by this Board. We believe a similar holding is appropriate in the instant appeal. Inventory case files assembled by BLM evince its firsthand knowledge of the lands at issue. In addition, BLM has received the benefit of numerous comments from individuals and groups of wide ranging interests. BLM's expertise and familiarity with the units on the ground entitle it, we believe, to our considerable deference in such subjective determinations. Appellant's views to the contrary, while not unreasonable, do not undermine this deference.

Appellant has also challenged the WSA designation on the basis that the area lacks certain wilderness characteristics due to the intrusion of outside "sights and sounds." These alleged intrusions include the sounds of military and civilian planes flying over the area, train whistles, blasting, and noise from irrigation pumps in the Hyder area. Also, appellant asserts that lights from Hyder and Gila Bend can be seen at night as well as car lights from the highways.

Sights and sounds of man's imprint, whether located just beyond the perimeter of a WSA or in an inholding within, are generally considered during the study phase of wilderness review. Such sights and sounds technically emanate from land outside the WAS and are treated by BLM as so occurring (OAD 78-61, Change 2 at 3). BLM's practice is to assess the imprints of man outside unit boundaries during the inventory stage only in situations where the imprint is adjacent to the unit and its impact is so extremely imposing that it cannot be ignored, and if not considered, reasonable application of inventory guidelines would be questioned (OAD 78-61, Change 3 at 4). On the basis of appellant's submissions on appeal, we perceived no abuse of this policy by BLM.

Appellant maintains that the severity of climate, sparsity of vegetation and lack of natural sources of water preclude outstanding opportunities for solitude or a primitive and unconfined type of recreation. Appellant contends that wildlife is practically nonexistent and that in the last 5 years no deer have been in the area. It is the opinion of appellant that this area is dreary, hostile to recreationists, and uninviting. In its narrative BLM stated that outstanding opportunities for solitude are present throughout much of the unit; that the mountainous northern portion of the

unit presents a complex series of peaks, ridgelines, washes, valleys, and canyons to explore; that this diverse terrain will effectively screen hikers from each other, and easily provide numerous areas to find seclusion. BLM found that the unit's size coupled with its dissimilar landscape and diversity of attractions, will insure outstanding opportunities for solitude.

[3] Whether a unit possesses outstanding opportunities for solitude requires a highly subjective determination by BLM. In an effort to guide this determination, the WIH at page 13, instructs BLM to consider factors which influence solitude only as they affect a person's opportunity to avoid the sights, sounds, and evidence of the other people in the inventory unit. Size, natural screening, and the ability of the user to find seclusion are set forth as factors influencing solitude.

While extremes of temperature may affect the number of users to an area, a unit's opportunities for solitude would generally exist independent of temperature extremes. Similarly, opportunities for solitude may exist in the absence of sufficient moisture to promote vegetative screening if topographic screening is present in the unit. Appellant's arguments with respect to the unit's opportunities for solitude do not persuade us that BLM has erred in its determination.

A finding of outstanding opportunities for either solitude or a primitive and unconfined type of recreation is sufficient to permit an inventory unit to enter the study phase, assuming size and naturalness requirements have been met. Churchill County Board of Commissioners, 61 IBLA 370 (1982). Having affirmed BLM's finding that outstanding opportunities for solitude exist in the WSA, we find no need to discuss appellant's contentions as to recreation. We note in passing, however, that appellant's arguments on the subject amount to little more than simple disagreement with BLM's subjective findings. No specific errors are discussed. More than simple disagreement is required to reverse BLM's decision or place a factual matter at issue. Don S. Orlando, 64 IBLA 7, 11 (1982).

A decision of the State Director designating an area as a WSA will not be disturbed on appeal where appellant fails to meet its burden of pointing out specific errors of law or fact in the decision below. Sierra Club, supra.

[4] In his final argument appellant contends that his property is being taken without just compensation and requests a jury trial in order to seek damages. Appellant's contention is without merit. The fact that lands are included within a WSA does not mean that mining is precluded on these lands, or that the leased claims have been nullified. Section 603(c) of FLPMA authorized continuation of existing uses, such as mining, in the same "manner and degree" as they were being conducted on October 21, 1976. In the case of such an existing use conducted in the same manner and degree, BLM is authorized to regulate only so as to prevent unnecessary or undue degradation of the environment. State of Utah v. Andrus, 486 F. Supp. 995, 1005 (D. Utah 1979); Havlah Group, 60 IBLA 349, 88 I.D. 1115 (1981); 43 CFR 3802.1-3.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Anne Poindexter Lewis
Administrative Judge

Gail M. Frazier
Administrative Judge